

Message Text

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DRAFTED BY L/M:CLBLAKESLEY:MERS

APPROVED BY L/M:KEMALMBORG

S/CCT - MR. GATCH

L - MR. FELDMAN (SUBS)

JUSTICE - MR. STEIN

EUR/WE - MR. MARSH

----- 046064

P 212037Z MAR 75

FM SECSTATE WASHDC

TO AMEMBASSY PARIS PRIORITY

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E.O. 11652: N/A

TAGS: CPRS, PFOR, FR

SUBJECT: EXTRADITION - HOLDER/KERKOW

REF: PARIS 6903, 6853, 5347, 4528;

1. DEPARTMENT DEEPLY DISTRESSED AT DEVELOPMENT OF HOLDER CASE. IT IS PRECISELY WHAT DEPARTMENT WAS AFRAID MIGHT HAPPEN IF WE WEREN'T THOROUGHLY INFORMED OF FRENCH JURIS-PRUDENCE AND PROCEDURE AS REQUESTED STATE 35929. IN HIND-SIGHT IT APPEARS UNFORTUNATE THAT WE DID NOT HIRE AN ATTORNEY TO ADVISE US. IT IS LUDICROUS THAT WE ARE NOW FACED WITH FAIT-ACCOMPLI AS A RESULT OF THE RELATIONSHIP OF THE AVOCAT GENERAL, THE MINISTRY OF JUSTICE, AND THE COURT; WE HAD WISHED TO UNDERSTAND THE PROCEDURE SO AS TO PROTECT AGAINST SUCH AN OCCURRENCE. WE SHOULD HAVE BEEN ADVISED THAT UNDER FRENCH PROCEDURE THE AVOCAT GENERAL, WHO IS SUPPOSED TO BE PASSIVE BEFORE THE COURT, MIGHT TAKE A FORMAL POSITION BEFORE THE COURT THAT THE FUGITIVES SHOULD NOT BE EXTRADITED AND THAT THE MINISTRY OF JUSTICE EITHER

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MIGHT NOT KNOW WHAT THE AVOCAT GENERAL WAS DOING OR MIGHT

REFRAIN FROM INFORMING US.

2. AT THIS POINT, EMBASSY REQUESTED TO MAKE STRONG, HIGH

LEVEL APPROACH TO MINISTRY OF JUSTICE AND TO LEGAL ADVISER
TO FOREIGN MINISTRY (DE LA CHARRIERE) REGARDING THE ISSUES
DISCUSSED IN THIS CABLE AND TO INDICATE OUR DEEP CONCERN
ABOUT THIS WHOLE PROCESS. THIS EXPERIENCE CASTS DOUBT
ON THE EFFICACY OF THE EXTRADITION PROCESS. BECAUSE OF
THE INTRINSIC IMPORTANCE OF THIS CASE AND BECAUSE THIS IS
ONE OF THE MAJOR EXTRADITIONS SINCE REVISION OF THE TREATY,
WE WISH TO HAVE A FULL UNDERSTANDING OF WHAT HAS OCCURRED
AND HOW TO PROCEED IN THIS AND FUTURE CASES. THUS WE
WOULD APPRECIATE A FULL ANALYSIS OF WHAT HAS TRANSPRIRED AND
OF THE APPARENT MISUNDERSTANDING ENSUING FROM OUR CONT-
ACTS WITH MINISTRY OF JUSTICE. WE WOULD ALSO APPRECIATE
KNOWING THE GOF VIEW OF EXTRADITION PROCEDURE, INCLUDING
GOF VIEWS CONCERNING RECIPROCAL RESPONSIBILITIES FOR
ASSISTANCE UNDER THE TREATY. EMBASSY IS INSTRUCTED TO
UNDERScore OUR DISTRESS OVER WHAT HAPPENED IN THIS CASE
OF SUCH IMPORTANCE TO USG.

3. EMBASSY REQUESTED TO MAKE IT CLEAR TO GOF AUTHORITIES
THAT WE ARE SURPRISED THAT, ALTHOUGH WE WERE NEVER ADVISED
BY GOF THAT DOCUMENTS WERE INCOMPLETE, OFFICIAL GOF
REPRESENTATIVE BEFORE THE COURT (ALTHOUGH HE DISCLAIMED
HIS ROLE AS REP. OF GOF) TOOK THE POSITION THAT EXTRADITION
SHOULD BE DENIED BECAUSE DOCUMENTATION APPEARED INCOMPLETE.
FURTHERMORE, EMBASSY SHOULD INDICATE THAT WE WERE NEVER
ADVISED THAT AVOCAT GENERAL WOULD POSSIBLY TAKE A POSITION
BEFORE THE COURT CONTRARY TO USG REQUEST. WE FEEL THAT AT
A VERY MINIMUM, THE TREATY CALLS FOR THOROUGH REVIEW OF
DOCUMENTS BY FOREIGN AND JUSTICE MINISTRIES AND ADVICE AS
TO THEIR SUFFICIENCY. IN ADDITION, AS MINIMUM REQUIREMENT
OF TREATY, USG SHOULD HAVE BEEN INFORMED OF GOF POSITION
ON THE EXTRADITION; IF GOF HAD TAKEN A POSITION THAT CRIME
IS OF POLITICAL CHARACTER AND, THEREFORE, NOT EXTRADITABLE,
USG SHOULD HAVE BEEN SO ADVISED. IN THIS CASE, HOWEVER,
WE WERE PRESENTED WITH A FAIT-ACCOMPLI BEFORE THE FRENCH
JUDICIARY.

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4. MAJOR PART OF OUR DISTRESS HAS RESULTED FROM OUR MIS-
UNDERSTANDING CREATED BY MINISTRY OF JUSTICE AS REPORTED
BY EMBASSY. AS STATED ABOVE, WE HAD NO IDEA THAT AVOCAT
GENERAL WOULD ADVISE COURT AGAINST EXTRADITION. IN PARIS
5109, EMBASSY INDICATED THAT IT HAD IMPRESSION THAT GOF
QUOTE WILL ALLOW COURT ACTION TO PROCEED NORMALLY, BECAUSE
IT OBVIOUSLY CANNOT DO OTHERWISE. UNQUOTE. IN PARIS

5347, EMBASSY ADVISED THAT GOF AUTHORITIES HAD NOT EXPRESSED OPINION RE POLITICAL OFFENSE ASPECT OF CASE, BUT THAT IT WOULD PROBABLY BE RAISED BY DEFENSE. IN FACT, EMBASSY WAS ADVISED BY JUSTICE MINISTRY THAT EVIDENCE RE POLITICAL OFFENSE SHOULD NOT BE INCLUDED WITH DOCUMENTATION,

AS IT WOULD BE QUOTE GRATUITOUS UNQUOTE UNTIL DEFENSE RAISED THE ISSUE. THEN, BEFORE THE COURT, THE AVOCAT GENERAL TAKES THE POSITION THAT EXTRADITION SHOULD NOT BE GRANTED, BECAUSE THE DOCUMENTATION IS INCOMPLETE; IT INCLUDED NO EVIDENCE TO DISPROVE THE POLITICAL OFFENSE CLAIM. OBVIOUSLY, USG SHOULD HAVE, AT THE VERY LEAST, BEEN ADVISED THAT SUCH A POSITION WAS BEING TAKEN. IF, AS PER THE JUSTICE MINISTRY'S ADVICE, THE EVIDENCE ON POLITICAL OFFENSE WOULD BE GRATUITOUS AND UNNECESSARY UNTIL DEFENSE RAISES THE ISSUE, WHY ARE WE NOW NOT ALLOWED TO PRESENT EVIDENCE IN REPLY TO DEFENSE ALLEGATIONS OF POLITICAL NATURE OF OFFENSE. IT APPEARS NOW THAT WE ARE, INDEED, SO REQUIRED UNDER FRENCH PROCEDURE AND, INDEED, SHOULD HAVE BEEN ADVISED TO INCLUDE EVIDENCE IN ANTICIPATION OF DEFENSE ALLEGATIONS. THIS RAISES THE QUESTION OF WHETHER, UNDER FRENCH LAW, ONE IS REQUIRED TO PROVE A NEGATIVE. JUSTICE MINISTRY ADVICE INDICATED THAT THIS WAS NOT NECESSARY, BUT RESULT OF AVOCAT GENERAL'S STATEMENT TO COURT IS THAT WE SHOULD HAVE INCLUDED EVIDENCE TO PROVE A NEGATIVE. THUS, NOT ONLY WERE WE ADVISED THAT DOCUMENTATION APPEARED COMPLETE, WE WERE ADVISED NOT TO INCLUDE QUOTE GRATUITOUS UNQUOTE EVIDENCE RE POLITICAL NATURE, WHEN, ALL ALONG, FRENCH PROCEDURE WOULD NOT ALLOW SUBSEQUENT PRESENTATION. PLEASE HAVE GOF AUTHORITIES REPLY TO THIS ISSUE AS WELL.

5. ALTHOUGH EMBASSY REPORTED IN PARIS 6853 THAT MIN.
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JUSTICE HAS ADVISED THAT THERE IS NO WAY TO APPROPRIATELY PRESENT SUPPLEMENTARY DOCUMENTATION TO COURT AT THIS POINT UNLESS COURT SO REQUESTS, U.S. JUSTICE DEPARTMENT IS PREPARING SUCH EVIDENCE. FBI HAS TAPES OF ENTIRE CONVERSATIONS WITH PILOTS REFUTING CLAIM THAT SUBJECTS REQUESTED TO GO TO HANOI AT ANY POINT, AND OTHER RELEVANT INFORMATION. DEPARTMENT IS RAISING FUNDS TO HIRE AN ATTORNEY TO ADVISE US REGARDING THESE POINTS, AND ESPECIALLY TO SEE IF THERE IS ANY WAY TO PRESENT THIS ADDITIONAL DOCUMENTATION TO THE COURT.

6. WITH REGARD TO RECIPROCAL TREATY RESPONSIBILITIES, ARTICLE VI OF TREATY PROVIDES THAT QUOTE THE APPROPRIATE LEGAL OFFICERS . . . SHALL, BY ALL MEANS WITHIN THEIR

POWER, ASSIST THE REQUESTING PARTY BEFORE THE RESPECTIVE JUDGES AND MAGISTRATES. UNQUOTE. USG INTERPRETS THIS CLAUSE TO MEAN THAT THE PARTIES WILL REPRESENT EACH OTHER BEFORE THE JUDGES AND MAGISTRATES. WE WOULD APPRECIATE

KNOWING GOF VIEW OF THIS OBLIGATION. DEPARTMENT UNDERSTANDS (AS PER PARIS 4528, 6903) THAT UNDER FRENCH LAW, ALTHOUGH THE AVOCAT GENERAL IS AN OFFICER OF THE COURT AND PLAYS A PASSIVE ROLE BEFORE THE COURT, HE IS STILL AN OFFICER OF THE FRENCH GOVERNMENT. IT WOULD APPEAR THAT IN THIS CASE THE AVOCAT GENERAL WAS NOT REALLY PASSIVE, BUT THAT HE TOOK THE POSITION OF THE DEFENSE, AT A MINIMUM AND IT WAS ACKNOWLEDGED IN PARIS 4528, THE TREATY REQUIRES THAT GOF ADVISE USG OF DEFICIENCIES IN DOCUMENTATION. GOF OFFICIAL BEFORE THE COURT TOOK THE POSITION THAT THE DOCUMENTATION WAS NOT COMPLETE AND THAT THE FUGITIVES SHOULD NOT BE EXTRADITED. THIS WAS DONE WITHOUT ADVISING USG. ALTHOUGH DOCUMENTS ARRIVED JUST UNDER TREATY TIME LIMITATION, THERE WAS CERTAINLY ENOUGH TIME BEFORE THE HEARING TO ADVISE US OF THE POSITION TO BE TAKEN BEFORE THE COURT SO THAT WE COULD RECTIFY THE DEFICIENCIES. THEREFORE, ALTHOUGH ARTICLE 33 OF THE FRENCH CODE DE PROCEDURE PENALE PROVIDES THAT THE AVOCAT GENERAL IS FREE TO PRESENT THOSE ORAL OBSERVATIONS THAT HE BELIEVES APPROPRIATE IN THE PURSUIT OF JUSTICE, IF DESPITE THE QUOTE PASSIVE UNQUOTE ROLE HE IS SUPPOSED TO LIMITED OFFICIAL USE

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PLAY, HE DECIDES TO TAKE THE POSITION OF THE DEFENSE THAT THE FUGITIVES SHOULD NOT BE EXTRADITED, PROVISIONS FOR MUTUAL COOPERATION IN THE TREATY WOULD AT LEAST REQUIRE USG TO BE SO ADVISED. INGERSOLL

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